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In The

Supreme Court Of The United States

October Term, 1990

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, et al.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. Respondents attempt to justify the Oklahoma Supreme Court's limiting the retroactive effect of its decision to June 23, 1987, when this Court decided *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), by arguing that the *Scheiner* decision is what rendered Oklahoma's retaliatory tax

[1] National Private Truck Council, Inc. is a trade association and has no subsidiaries. The non-wholly owned subsidiaries of Westinghouse Electric Corporation are listed in App. H to the Petition for a Writ of Certiorari.

[2] Respondents are the Oklahoma Tax Commission and the following members of the Commission: Robert E. Anderson, Chairman, Robert L. Wadley, Vice Chairman, and Don Kilpatrick, Secretary-Member. The individual respondents are successors in office to other officials whom petitioners had sued in their official capacities for declaratory and injunctive relief.

unconstitutional. (Br. in Opp. at 2-3.) That argument is groundless. The retaliatory taxes in this case discriminated on their face against trucks registered in other states. They were thus unconstitutional under principles that were well established long before *Scheiner*, which concerned taxes that were nondiscriminatory on their face but discriminatory in effect. The fact that one of the taxes that Oklahoma was retaliating against – Pennsylvania's axle tax – was invalidated in *Scheiner* was completely irrelevant to the validity of Oklahoma's taxes.

Indeed, the Oklahoma Supreme Court itself appeared to recognize as much when it held that Oklahoma's retaliatory taxes were "plainly discriminatory" (Pet. App. 11a), and "[o]bviously do not pass the third and fourth prongs [of the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 271 (1977)]." (*Id.* at 13a.) That holding was based on the simple fact that Oklahoma's retaliatory tax statute "impose[s] excessive fees and taxes on out-of-state registered motor carriers that are not imposed on Oklahoma registered motor carriers." (*Id.*) Furthermore, that court correctly held that retaliatory legislation like Oklahoma's is constitutionally impermissible *per se*, whether or not the actions of the other states that they are retaliating against are themselves unconstitutional, and correctly cited *Travis v. Yale & Towne Mfg. Co.*, 250 U.S. 60 (1920) and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), among other cases, for that proposition.

That the *Scheiner* decision had no bearing on the unconstitutionality of Oklahoma's retaliatory taxes is also evident from the fact that many of the taxes of other states that they retaliated against were not invalidated by *Scheiner*, such as the distance-based taxes imposed by Ohio, New York, Arizona and other states. The Oklahoma Supreme Court, however, correctly invalidated Oklahoma's retaliatory taxes in their entirety, regardless of the type or validity of the taxes they were retaliating against.

2. Respondents also argue that this Court's decision in *Dennis v. Higgins*, 111 S.Ct. 865 (1991) should not be applied to this case but should be made prospective only because it overruled earlier decisions of the Eighth Circuit and the Tenth Circuit, which respondents characterize as "clear past precedent."[3] (Br. in Opp. at 5-6.) This argument is meritless. Before the *Dennis* decision there was a conflict among the circuits,[4] and the law was, at best, unsettled.

Prospective application of a decision is an exception to the general rule, and it is warranted only where, as a threshold matter, the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). This Court's resolution of a conflict among the lower courts does not amount to "overruling clear past precedent." It is also difficult to see how respondents could have "relied" on the proposition that Commerce Clause violations were not actionable under 42 U.S.C. § 1983. Furthermore, the Court's opinion in *Dennis* makes clear that its decision *was* foreshadowed by — indeed was squarely based upon — many prior decisions under the Commerce Clause and § 1983. Accordingly, petitioners submit that *Dennis* does not meet even the threshold requirement for prospective application. If there were any substantial question with respect to respondents' contention, however, it would still be an important question warranting this Court's review.

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[3] *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1138 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984); *J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985).

[4] *Compare Consolidated Freightways Corp. v. Kassel, supra*; *J&J Anderson, Inc., supra*; and *Kraft v. Jacka*, 872 F.2d 862, 869 (9th Cir. 1989) with *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), vacated on other grounds, 494 U.S. ____, 110 S.Ct. 1249 (1990); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); and *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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